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No. 85-862

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

HUSTLER MAGAZINE, INC.,
Petitioner

v.

ROBYN DOUGLASS,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION OF RESPONDENT

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The Respondent, ROBYN DOUGLASS, pursuant to order of this Court, respectfully submits the following Response to the Petition of HUSTLER MAGAZINE, INC. for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit. Hustler has petitioned this Honorable Court to review the decision of the Seventh Circuit which has reversed a judgment rendered in favor of Douglass and remanded this matter for a new trial on account of procedural errors occurring at trial. Subsequent to the Seventh Circuit's original disposition of the appeal, Hustler filed a Petition for rehearing with

a suggestion for rehearing *in banc*. This petition was denied. It is from this order that Hustler files the instant petition for a writ of certiorari.

STATEMENT OF THE CASE

It is necessary for the Respondent to provide this Court with a statement of the case due to numerous misstatements of fact and misrepresentations of the record contained in Hustler's statement of the case previously filed with this Court. A careful reading of the Seventh Circuit opinion, supplemental order, and the Memorandum Order of the trial judge at the District Court level (these opinions appear at pages 1a through 46a of Hustler's petition) clearly reveals these shortcomings as well as other misrepresentations of the various issues presented by the Douglass claim. The same arguments presented by Hustler in this Court have already been heard and rejected by the jury, the District Court and in two separate opinions authored by the Court of Appeals for the Seventh Circuit. Nevertheless, Hustler presses forward in its attempt to find a sympathetic forum.

A. Statement of Facts

At the time of trial, ROBYN DOUGLASS was a 31 year old commercial and movie film actress. (T. 39, 40). She grew up in the San Francisco area and relocated to Chicago to pursue a career as a print model. (T. 43-45). Douglass appeared as a model in assorted print media between the years 1974 to 1977. (T. 44, 49, 484, 487). During this period, she appeared in Playboy Magazine, including an appearance on the cover in December, 1974. (T. 50, 45, PX 1). She stated she was proud of this appearance, as was her family, due to the prestige of the Magazine and the association it brought with more famous and well known personalities who had previously appeared on the cover of Playboy. This was true even though the only identification of her was contained in

the cover credits located inconspicuously on a separate page of the Magazine. (T. 45-47, 399, 492 PX 1, DX 2).

In 1974, Playboy Magazine planned to publish two thematic pictorials. These were given the working titles of "Ripped-Off Pictorial" and "Water and Sex Pictorial," respectively. (T. 179-180, 190-191, 535). Augustin Gregory, a freelance photographer at that time, was commissioned by Playboy Magazine to submit photographs consistent with these themes. (T. 181). Playboy Models, Inc., one of the modeling agencies with which ROBYN DOUGLASS was associated, assigned her as a model to appear for these pictorials. (T. 61, 91).

The shooting session for "Ripped-Off Pictorial" took place on August 6, 1974. Contrary to Petitioner's inappropriate editorializing regarding the content of these photographs, the artistic concept of this session was that of a very feminine, soft focus portrayal of two women gently tugging or pulling at each others underclothing. (T. 66, 506). Following this session, the other model, Mary Ann Esterle Halpin, and ROBYN DOUGLASS signed standard Playboy Magazine releases assigning to it the license and right to use, publish and distribute these photographs. However, both models retained all ownership interest in said photographs. (T. 302, 377, 472, PX 8, PX 15). Neither model, nor Playboy gave Gregory, or Hustler any right to use any photographs taken during this session. (T. 450, 509, 511, 512). Augustin Gregory also released and assigned all his photographer's rights to these photos to Playboy Magazine. (T. 186-188).

The shooting of the "Water and Sex Pictorial" was also taken at Gregory's studio on November 8, 1974. (T. 87-89). This was another Playboy Models, Inc. assignment in which Douglass appeared under a shower wearing a yellow raincoat. Similar releases were given to Playboy by both the photographer and Douglass after

this session. (T. 91-99, 508-509, 630-637). Again, at no time was Gregory or Hustler given permission to use these photographs by either Douglass or Playboy Magazine. (T. 110, 192).

Only one photograph from the "Ripped-Off Pictorial" was published by Playboy Magazine. This photo appeared in the March, 1975 issue. (T. 73, 76, 82, 189, PX 11, PX 12). Neither the published photo nor the accompanying text identified the models by name. In fact, ROBYN DOUGLASS was not identifiable in *any* photo ever published in Playboy Magazine or Oui (a Playboy subsidiary) except for two update features focusing on the career progressions of models previously appearing in the Magazine. However, these were published years after the photos in issue were taken. (T. 489-491, DX 1, DX 3). No pictures taken at the "Water and Sex Pictorial" were ever printed in Playboy. (T. 19).

Between 1976 and 1977, Douglass began to phase out her print modeling career and began to devote more time to a commercial acting career in Chicago as well as a career in Los Angeles in dramatic acting. (T. 50, 119-121). Her career blossomed in 1979 when Douglass appeared as the female lead in the movie "Breaking Away." This moive led to an appearance on a television show that year, "Battlestar Galactica". (T. 121, 468). The advertising community loved the movie and Douglass actively promoted these credits to them, resulting in better quality and higher paying commercial work. (T. 112, 121).

In March, 1980, during that same period of time, Augustin Gregory was hired as photo editor of Hustler Magazine. Gregory was hired by Bruce David, Editor and Associate Producer, Lee Quarnstrom, Managing Editor, and Althea Flynt, Publisher. During the negotiations regarding Gregory's hiring, he was advised by these top-level Hustler executives that Hustler was looking

to upgrade its image. It was thought that celebrity photos would accomplish this purpose. (T. 541-542, 546, 585, 1004). Gregory showed a sample of his photographs at this meeting, including slide photographs of Douglass taken at the two photo sessions described above. The idea of publishing these photos was initiated at that time by Lee Quarnstrom. (T. 544-546, 555-556).

Gregory subsequently sold these photographs to Hustler while employed by Hustler and in connection with his assigned objective to improve the Magazine's image. He received a manual check for the photos in order to expedite payment due to a falling out that he had because of creative differences which forced him to leave the Magazine in September, 1980.

Although it is the admitted policy of Hustler to never publish any photograph without a release *accompanying* photographs, an interoffice memo dated March 24, 1980 was circulated indicating that the publication of the Douglass photos had already been committed to publication, although they would be delayed one month. That same memo directed Gregory to continue efforts to locate releases for these photos. The publication of the photographs was committed to long before Hustler received any purported releases, contrary to its own stated policy of never publishing any photos without releases accompanying them. (T. 550, 590, 1016, PX 46). Hustler explained the delay in publication not because of the absence of releases, but rather because Hustler had "better material." (T. 551). On August 28, 1980, a second interoffice memo indicates that the releases still had not yet been produced. (T. 551, 555, PX 47). Preparation for the publication of Hustler began four to six months in advance of the issue date. The issue date of the Hustler Magazine of which Douglass complains was January, 1981. Thus, the work on that particular issue began as early as June, 1980. (T. 539, 558-559, 955). Moreover, the December, 1980 issue of Hustler contained

a prominent announcement that Douglass would appear as a "Hustler Celebrity Exclusive" in the January, 1981 issue. As a result of this lead time, Hustler was committed to the publication of these photographs as early as May, 1980, a full five months before Hustler was allegedly provided with releases. (T. 101, 967-968, PX 18, PX 19).

In September, 1980, releases purporting to have been signed by Douglass were allegedly delivered by Gregory to Hustler. (T. 559). However, Hustler failed to produce the original releases. Instead, it merely produced at trial, photocopies of the alleged releases. (T. 911). One copy was declared a forgery by a handwriting expert. The other copy was of such poor quality that the expert could render no opinion. (T. 912). However, both releases, including the less discernible document, were identified as forgeries by Douglass. (T. 159).

At trial, when Augustin Gregory was tendered these photocopies of releases, he was unable to identify them as being the ones he allegedly turned over to Hustler. (T. 620). Gregory doubted that these were copies of the releases he tendered due to the fact that he never identified his business as "Augustin Gregory Photo." (T. 628). He further testified that it was his standard business practice to obtain model signatures on all releases the day of the shoot and before the model left his studio. (T. 641-642). The "Ripped Off Pictorial" was shot on August 6, 1974 and the "Water and Sex Pictorial" took place on November 8, 1974. Yet the forged releases are dated November 12, and 16, 1974, respectively. (T. 73, 95, 629).

In Hustler's exuberance to ride the coattails of Douglass' "Breaking Away" accomplishment, it overlooked the other model who appeared at the "Ripped-Off Pictorial," Mary Ann Esterle Halpin. Kelly Garrett, an editor at Hustler Magazine testified that the two re-

leases purportedly signed by ROBYN DOUGLASS were the only ones provided to Hustler by Gregory. (T. 945, 948, 970). Yet, neither of these two releases were from the "other model." Hustler admitted it was important to obtain her release as well. (T. 1017). It was the responsibility of Bruce David, the Editor and Associate Publisher, to obtain these releases. (T. 1017). Yet he cannot recall seeing any release from the second model. In fact, Hustler never even knew the name of the "other girl" in the photos. (T. 1020, PX 21, PX 22, PX 46).

Douglass first received notice that Hustler was going to publish the photos of her from her friend, Joel Cory, on November 14, 1980. Cory received the information from a friend who had seen the December, 1980 issue of Hustler advertising the inclusion of Douglass' photographs, billed as a "Hustler Celebrity Exclusive." (T. 608). Douglass purchased the December, 1980 issue and discovered Gregory's name as Photo Editor. She attempted to obtain the January, 1981 issue but it had not been released to the public either through newsstand sales or by subscription mailing. (T. 106, 154-158). A news-vendor in Evanston did her "a favor" and released a copy of the January issue to her. (T. 106-108, 728; PX 21). She went home and called her attorney, Anthony Onesto. (T. 104, 110). Mr. Onesto testified that Douglass was very upset, and requested that he have publication and distribution of this issue stopped before it was distributed for public sale. (T. 105, 110, 149).

On November 17, 1980, Onesto contacted the attorney for Hustler and requested that Hustler stop the publication because it did not have any right to publish the photographs. Hustler's attorney responded that the Magazine had proper releases and would in fact, distribute the publication as planned. (T. 152). On November 21, 1980,

Onesto received from Hustler two releases which bore the purported signature of Robyn Douglass. (T. 155; PX 29, PX 30, PX 31). Douglass denied at that time that the signatures on the documents were hers and declared them forgeries. (T. 159). Onesto immediately called Hustler's attorney on either November 23rd or November 24th and apprised him of this fact, demanding Hustler not publish or distribute the issue with the Douglass feature. This was ignored. (T. 161).

Hustler's petition asserts that when Douglass instructed the Magazine not to publish, it was too late to recall the issue. However, there is no evidence of this nor does Petitioner cite any authority in the record for this statement. Hustler's Petition further ignores Gregory's statement that when he delivered the purported releases to it, he instructed Hustler to contact Douglass for approval. (T. 647). Hustler, however, made no effort to contact Douglass at that time nor did Hustler ever check with Gregory regarding the authenticity of the purported releases when informed by Onesto in November, 1980. (T. 648).

The photographs published by Hustler Magazine in its January, 1981 issue were accompanied by copy written by Bruce Helford, an editor of Hustler. In its Petition, Hustler attempts to sanitize for this Court the text written by Helford and the inferences to be drawn from that copy. At page 5 of Hustler's Petition is found the language of the copy of which Douglass complains. Hustler presents this copy in a piecemeal way, omitting the full passage, and attempting to place it in a complimentary light. It tries to persuade this Court to draw from this text inferences which are different than the conclusions reached by the jury, the Trial Court, and the Appellate Court. In authoring this copy, Helford admittedly created the inference of sexual climax and lesbianism by

using a quotation from a press release from "Breaking Away" out of context, and played upon the meaning of those words, within which, as spoken by Douglass, no sexual connotation was intended nor present. (T. 394, 932-936, DX 28). Thus, rather than being a complimentary commentary about the Respondent as the press release was originally intended, the text accompanying the feature was instead admittedly intended to create the inference and innuendo of a sexual climax by the models in a lesbian relationship. (T. 262, 264, 933)

In addition to the false text which placed the Respondent in an offensive false light, Douglass' name was positioned across the front cover of the Magazine proclaiming Douglass' appearance in Hustler. Her name and credits achieved top billing in larger and bolder print than any other feature. (T. 137-138; PX 21).

Further, Hustler bills itself as the most "irreverent and iconoclastic magazine ever published." (T. 239; PX 38). Even Hustler's Petition filed in this court recognizes that "[t]he magazine is, by design, a controversial and irreverent publication that has come to be disliked by a large segment of the public." Petition of Hustler Magazine, p. 3. In addition, Larry Flint, the Publisher of Hustler, has stated that the models who appear in Hustler do so by choice and are well paid for their appearance. (T. 131, 133, PX 24). Robyn Douglass never consented to, nor was compensated for the use of her name and likeness in Hustler Magazine. The circumstances surrounding the publication of Robyn Douglass' name, potographs and accompanying text in the January 1981 issue along with the resulting involuntary association thrust upon her was highly offensive and tainted her image as a commercial actress. (T. 104, 110, 655). In fact, it was so devastating that it caused her to become "*persona non grata*" in the advertising community and

"killed" her commercial acting career. (T. 140, 264, 684). An executive producer of a major nationwide advertising agency who had a high regard for her talent and who had hired her in the past having full knowledge of the Respondent's appearances in Playboy Magazine was no longer willing to do so. This reluctance was due to the conservative nature of the advertising community and risk of having the association with Hustler surface, embarrassing the ad agency's client. (T. 655, 657, 661-662, 665).

B. Proceedings in the District Court

Douglass asserted in the United States District Court for the Northern District of Illinois that the unauthorized use of her name, photographs, and false text accompanying the photos in the December, 1980 and January, 1981 issues of Hustler violated her right to privacy. More specifically, the Plaintiff claimed that the publication placed her in an offensive false light as well as wrongfully appropriating her name and likeness for the Magazine's commercial benefit.

Hustler's Petition misstates the character and nature of Douglass' claim before the District Court. The complaint of the Respondent is not in any way associated with the content of the photographs. Hustler stole these photographs which had never been published before in any medium. It advertised her appearance in its Magazine, claiming that she was a "Hustler Celebrity," intimating that she was appearing therein voluntarily, and intentionally insinuating that the photographs depicted the Respondent in a state of sexual climax with another woman. It exploited her name prominently on the cover, thereby involuntarily associating her with the Magazine. Because of these false statements and innuendo, knowingly or recklessly made by Hustler, and because the trial strategy of Hustler itself to equate the Respondent's

appearance in Hustler to those in Playboy Magazine, Respondent, to demonstrate the offensiveness of the false light in which she was cast as well as the damages she suffered, had to show the degrading nature of the publication. This was not done, as Hustler asserts, to establish liability. It was done as proof upon the issue of the offensive nature of the false light and damages. Had Hustler's publication been truthful, accurate, and with proper consent, Douglass could not complain.

C. Proceedings in the Seventh Circuit

The Court of Appeals for the Seventh Circuit considered the Petitioner's Appeal requesting reversal of the judgment entered in the District Court in favor of the Plaintiff and the Respondent's Cross Appeal challenging the propriety of the remittitur by the District Court of the punitive damages assessed against Hustler. The Court of Appeals reversed the judgment in favor of the Respondent and remanded the case for a new trial based primarily upon an erroneous jury instruction in which the court advised the trier of fact that actual malice on the part of Hustler in printing these falsehoods could be proven by a preponderance of the evidence rather than using the clear and convincing standard. Hustler being dissatisfied with this result, filed its Petition for Rehearing with Suggestion for Rehearing *In Banc*, urging the Seventh Circuit to conduct a *de novo* review of the record to absolve Hustler of fault and liability. In undertaking this task, the Seventh Circuit held that the "jury's award was not only within the bounds of reason, but was so far as we are able to determine from the cold record, a correct finding." Petition of Hustler, p. 35a. Nevertheless, Hustler presses forward, presenting the same legal arguments already discredited by three different bodies in its Petition for a Writ of Certiorari.

ARGUMENT IN RESPONSE TO HUSTLER'S PETITION FOR A WRIT OF CERTIORARI

I. The Respondent's Cause Of Action For False Light Invasion Of Privacy And Wrongful Appropriation Of Her Name And Likeness Is Premised Upon The Falsity Of The Publication And Not The Context Of The Publication Itself

Hustler petitions this Court to review the decision of the Seventh Circuit based upon its perception that the Court premised liability not on the falsity of the speech but rather upon the vehicle within which the speech was uttered. This argument is an irresponsible misrepresentation of the substance of the Respondent's claim as well as the proofs adduced at trial. Hustler, in resurrecting this discredited, meritless argument once again hopes to focus this Court's attention away from the overwhelming evidence of the falsity of the publication and the offensive false light in which Douglass was cast.

Hustler's First Amendment argument regarding any possible protection provided under these circumstances must fail. "Freedom of the press under the First Amendment does not include absolute license to destroy lives or careers." *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 170 (1967) (Warren, C.J., concurring). The First Amendment protections afforded the press and the right of privacy of individuals are competing interests. Yet, this Court has stated that the "constitutional guarantees of free speech and press can tolerate sanctions against calculated falsehoods without significant impairment to the essential functions of these guarantees." *Time, Inc. c. Hill*, 385 U.S. 374 (1967). This holding was reiterated by this Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). "There is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in uninhibited, robust, and wide-open debate on public issues." *Id.* at 340.

Hustler's argument, stripped of its facade, is that the publisher must enjoy an unconditional immunity from liability for invasion of privacy where a person has appeared in the public domain. Yet, Hustler fails to give cognizance to the facts that the pictures it published were wrongfully obtained without valid releases, had never previously been published in any forum, and contained false statements in the copy as well as the advertisement of her appearance therein as a "Hustler Celebrity Exclusive."

The evidence presented in support of Respondent's claim for false light invasion of privacy and wrongful appropriation of her name and likeness clearly demonstrates that Hustler may be held liable without fear of infringing the Magazine's First Amendment protection. The December, 1980 issue of Hustler advertised the upcoming appearance of Robyn Douglass using the words "Hustler Celebrity Exclusive." (T. 103, PX 19). In the January, 1981 issue, her name and credits were again published on the cover of the Magazine in larger and bolder print, receiving top billing over every other feature. (PX 21, T. 137-138). Larry Flynt, Executive Publisher of Hustler, admits that the cover of the Magazine has only one purpose; to sell magazines. (T. 136, PX 1, PX 25, p. 4). He also represents to the world that the models appearing therein do so by choice and are well paid for their appearances. (T. 105, 110, 125, 149, 449). Douglass neither appeared by choice nor was she compensated. Gregory was hired by Hustler to upgrade the image of the Magazine. One way of accomplishing this was with celebrity photos. (T. 546, 1009). Shortly thereafter, a three page photo spread of the Respondent appeared in the Magazine. (PX 21, 22).

Other evidence adduced by trial regarding false statements and wrongful conduct on the part of Hustler exists. The copy accompanying the photos states that Douglass "was trained to use her body as a tool of her

trade" and that "these photos show how well she's learned to use that tool." (T. 262-263, PX 22). The copy includes a quotation attributed to Respondent extracted from an unrelated press release which referred to a dramatic climactic moment from her character's role in "Breaking Away". (T. 935-936). The original quotation had no sexual reference or intendment whatsoever, as admitted by Bruce Helford, author of the copy. (T. 936). The copy further states that "[f]rom the looks of Robyn (who's blonde in the photos of her and a female friend), she's never had any difficulty finding climactic moments." (PX 22). Helford admitted that it was his intention to create the impression that the models were in a state of achieving sexual climax. (T. 933). Helford knew that the copy would create the impression that the Respondent was involved in a lesbian encounter. (T. 930). He did this despite the fact that the "Ripped-Off" theme as conceived by Gregory was contrary to the inference created. (T. 66, 506). None of the nude photos published by Hustler had ever appeared in print before in any medium. The one picture from the "Ripped-Off" photo session printed in Playboy previously contained no inference of homosexuality or of sexual activity nor did the caption accompanying the photos suggest any such inference. (T. 66, 384, 506). It is uncontroverted fact that the photo session was not a lesbian sexual encounter and that Robyn Douglass is not a lesbian. (T. 66, 384, 422-423, 506). It is also uncontroverted that the Respondent never gave permission to anyone other than Playboy to use these photos. (T. 110, 192).

The evidence produced at trial is substantial and a review of this record clearly undermines the Petitioner's arguments herein that the Respondent complains merely of the messenger and not the message. Hustler's authorities cited in its Petition for a Writ of Certiorari on this point, although numerous in numbers, have no application to the case at bar. Each case cited by the Petitioner is

easily distinguishable due to the fact that the publications complained of were true and accurate and contained no falsity.

Petitioner cites *Falwell v. Penthouse International, Ltd.*, 521 F. Supp. 1204 (W.D. Va. 1981), in support of its contention that a public figure is unable to complain of a publication in a magazine which he finds personally objectionable. The Respondent does not challenge the Petitioner's interpretation of *Falwell*, but rather challenges the applicability of that decision to the instant matter. In *Falwell*, the Plaintiff "conceded that the account as published (was) accurate, truthful, and totally consistent with his statement . . ." *Id.* at 1209. It should also be noted that the *Falwell* court dismissed the false light count for the simple reason that the statutory law of Virginia preempted the common law right to privacy and that no cause of action for false light existed under the Virginia statutes.

Ann-Margret v. High Society Magazine, Inc., 498 F. Supp. 401 (S.D.N.Y. 1980), produces a similar result. In that case, the Defendant published a still and accurate reproduction from her appearance in a motion picture. Again, the publication complained of involved a faithful reproduction of a public performance.

The remaining cases cited for this proposition by Hustler are factually similar and the Petitioner, in its petition, sets forth the determinative passage distinguishing those cases from the case at bar. In *Goelet v. Confidential, Inc.*, 5 App. Div. 2d 226, 171 N.Y.S.2d 223 (N.Y. App. 1958), the court dismissed Plaintiff's complaint holding that the publication "obviously is not fictionalized nor is it a treatment of public figures distinct from the dissemination of news or information." 5 App. Div. 2d at 230. Likewise, in *Faucheux v. Magazine Management*, 5 Med. L. Rptr. 1697, 1700 (E.D.La. 1979), the court granted summary judgment for the Defendant

finding that a "factually accurate public disclosure is not tortious when connected with a newsworthy event even though offensive to ordinary sensibilities." Each and every other citation provided by Hustler for this proposition is distinguished by the fact that, unlike the case at bar, the publications complained of therein were factually accurate, were printed with a valid release, or were not highly offensive to reasonable sensibilities.[1]

The Seventh Circuit opinion in no way represents a fundamental departure from the protection accorded media defendants under the First Amendment. The Court determined that the jury's finding that the publication insinuated Douglass as a lesbian through the false copy was not only reasonable, but also correct. Furthermore, Hustler proclaimed to all the world in its December, 1980 issue that Douglass would appear as a "Hustler Celebrity." The Magazine splashed her name across the cover of that January, 1981 issue in bigger and bolder lettering than any other feature. The cover is admittedly designed to sell magazines. The publisher himself proclaims to the world that the models appearing therein do so voluntarily, and it actively sought out celebrity photos to upgrade the Magazine. It is clear

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[1] *Namath v. Sports Illustrated*, 48 App. Div. 2d 487, 363 N.Y.S.2d 276, 279 (N.Y. App. 1976) (". . . nothing degrading, derogatory, or untruthful about the copy."); *Sherwood v. McGowan*, 3 Misc. 2d 234, 152 N.Y.S. 2d 658 (Sup. Ct. 1956) (No claim of falsification as case concerned whether Plaintiff's consent had been exceeded); *Vitale v. National Lampoon, Inc.*, 449 F.Supp. 442 (E.D. Pa. 1978) (The parody complained of was of Playboy Magazine and not the Plaintiff, no comment was made about Plaintiff nor was her name used.); *Faloona v. Hustler Magazine, Inc.*, 607 F.Supp. 1341 (D.C. Tex. 1985). (Valid consents given for accurate use of photographs of children not identified by name in publication.); *Benally v. Hundred Arrows Press, Inc.*, 614 F.Supp. 969 (D.C. N.M. 1985) (Defendant did not seek to benefit from use of Plaintiff's name or likeness and use of photograph of Plaintiff and infant son on indian reservation home was not highly offensive to attach liability upon the Defendant.)

from these facts that the Magazine appropriated the Plaintiff's name and likeness for its commercial benefit. Hustler also falsely and intentionally placed the Respondent in an offensive false light. It purposely associated the name of Robyn Douglass with that of Hustler Magazine. As the Seventh Circuit noted, it was as if Hustler had proclaimed that "Robyn Douglass is proud to pose nude for Hustler Magazine." Petition of Hustler, p. 10a. However, it is undisputed fact that Douglass never gave permission to either Gregory or Hustler, nor did she consent to the offensive false sexual innuendo accompanying the photographs.

One element of the tort of false light invasion of privacy is that the false publication cast the individual in a light highly offensive to a person of reasonable sensitivities. *Leopold v. Levin*, 45 Ill.2d 434, N.E.2d 250 (1970); Restatement (2d) of Torts, § 652E (1976). In the case at bar, in order to prove that the wrongful appropriation of Douglass' name and likeness, her wrongful association with the Magazine as a "Hustler Celebrity," and the statements by the Publisher that the models appearing in Hustler did so by choice were highly offensive, the context and setting of the false publication became an issue. However, this was not the ultimate issue upon which the liability of Hustler is premised. This only becomes an issue upon finding that Hustler published false information about the Plaintiff with knowledge or reckless disregard for its falsity.

II. The Seventh Circuit Applied The Proper Standard Of Actual Malice. Furthermore, The Ultimate Disposition Of The Appellate Court In Remanding This Cause For A New Trial Has Rendered The Arguments Presented In Hustler's Petition Premature

Although Hustler has been successful in securing a reversal of the judgment entered against it, the Magazine is dissatisfied with the views of the Appellate Court. As ridiculous as it seems, one complaint of Hustler is

that although the Seventh Circuit conducted a *de novo* review, it did so too late, and only upon Hustler's petition for rehearing. However, the Petitioner implores this Court to redo all that has been done before, without any sound, reasonable, or practical reason for doing so. If this Honorable Court is so inclined to sit as trier of fact at this stage of the proceedings, Douglass invites it to conduct its own *de novo* review of the evidence. Although a needless exercise, given the fact that a new trial is ordered, an unbiased review of the record clearly demonstrates the validity of the Respondent's claim as well as the correctness of the jury's determination of the publication of the false material by Hustler with actual knowledge or reckless disregard as to its falsity.

The Seventh Circuit followed this Court's holding regarding the proper standard for actual malice enunciated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Actual malice must be proved by clear and convincing evidence and is defined as a publication made with knowledge of the falsity or with reckless disregard for the truth of the matter asserted. *Id.* The Magazine's argument that the Seventh Circuit's holding is "as watered down a holding of proof of actual malice by clear and convincing evidence as has been suggested by any court" is merely another hollow attempt by Hustler to ignore the wealth of evidence of substantial wrongdoing presented at trial; wrongdoing by not only Gregory, acting as agent for the Corporation, but by others in the inner sanctum of the Magazine's hierarchy.

Hustler argues that the Respondent never proved anyone in charge of the Magazine had any serious doubts as to the truthfulness of the publication. However, the association of Douglass' name and likeness with the Magazine was done without any release or authorization from Douglass or anyone else possessing any right or interest in the photos. The publication of these photos was done intentionally to enhance the image of Hustler. The pub-

lication had been committed to four months prior to Hustler obtaining any releases. When asked to produce releases at trial, Hustler presented two photocopies; one copy an obviously forged release, and the other copy so illegible that an expert could not even conduct an examination of the handwriting. However, the Respondent's unrebutted testimony identified both documents as forgeries. Finally, the testimony of Gregory and the officials of the Magazine as to who is responsible for the forgeries is in hopeless conflict. While Hustler attempts to shift the blame elsewhere, Gregory, when shown releases produced by Hustler, could not identify them as the ones he allegedly provided.

Gregory, as photo editor of this national magazine, presented these photos to Hustler. The photos were first viewed and caught the interest of Hustler executives while Gregory was being interviewed for the job. One objective of the company in hiring Gregory was to upgrade the image of the Magazine. The use of celebrity photos was thought to enhance the image of Hustler. These photos were coveted by Hustler and actively sought by the Magazine. Gregory acted as the agent and pursuant to the instructions of his principal in providing these pictures in order to upgrade the quality of the Magazine. His delivery of these photos was within the scope of his agency and therefore, any knowledge by Gregory of forged releases is knowledge imputed to the principal. This is a fundamental tenet of agency law.

Hustler predictably attempts to distance itself from the very acts of Gregory for which he was employed. It argues that in this isolated transaction, Gregory acted as an independent contractor for which Hustler can not be held liable. Hustler's only contention in support of this is that Gregory was paid $2,400 by manual check for these photos. This was merely to facilitate payment and is a meaningless fact. (T. 160). He sold these pho-

tos at the time he was photo editor and in furtherance of his assigned task to upgrade the image of Hustler.

Hustler contends it is not at fault because magazine policy requires releases to accompany every photo used. It argues that, if in fact, the forgeries are attributed to Gregory, he acted in direct opposition to the instructions of the principal so that the principal cannot be held liable. This argument is unsupported by the record. The photos were not accompanied by releases when Hustler purchased them, and although the particular edition was being put together as early as June, 1980, releases were not produced until September of that year. Furthermore, although another model was depicted in the photographs, Hustler never received her releases nor were they concerned with obtaining them. In fact, the Magazine did not even know the name of that model. This evidence alone indicates the recklessness of the corporation independent of any acts of Augustin Gregory.

The record is replete with other acts engaged in by agents of Hustler separate and independent from Augustin Gregory, such that the Petitioner can be held liable for invading the Respondent's right to privacy. The other intentional acts and recklessness of Hustler include the failure to investigate the authenticity of the releases after having waited a lengthy period of time for their production, although such investigation could have been easily accomplished; the failure to contact Douglass to authenticate the releases as directed by Gregory when he allegedly delivered releases in September, 1980; the publication of copy using a press release out of context and imputing lesbianism to the Plaintiff; and the failure to act after having been informed that the releases were forged and prior to distribution of the Magazine to the public. These facts demonstrate that the constitutional threshold of actual malice was met by clear and convincing evidence.

Hustler's Petition must be scrutinized with great caution. No substantial question of law or fact are presented upon which relief could be granted at this stage of the proceedings. Hustler merely searches for another tribunal to resurrect the same legal and factual arguments already discredited. To grant this petition will only further delay these proceedings needlessly in light of the Seventh Circuit having reversed and remanded this case for a new trial.

CONCLUSION

For the foregoing reasons, the Petition for Hustler Magazine, Inc. for a writ of certiorari should be denied.

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